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No. 12,171

IN THE

United States Court of Appeals

For the Ninth Circuit

HILLIARD SANDERS,

Appellant,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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JURISDICTIONAL STATEMENT.

The method by which appellant, an inmate of the United States Penitentiary at Alcatraz, California, seeks to invoke the jurisdiction of the United States District Court for the Northern District of California, hereinafter called "the court below", and the jurisdiction of this Honorable Court to review the decision of the Court below dismissing appellant's complaint for a temporary restraining order directed against the appellee, the warden of said penitentiary, is set forth in the said appellant's jurisdictional statement on page 1 of his opening brief.

STATEMENT OF THE CASE.

Appellant, an inmate of the United States Penitentiary at Alcatraz, Island, California, filed a complaint for a temporary restraining order to prevent the appellee, the warden of said penitentiary, from interfering with the mailing of a certain letter to an attorney Albert A. Spiegel, of San Francisco, California (Tr. 1-5), and the Court below issued an order to show cause. (Tr. 6.) The appellee filed a motion to dismiss on the ground that the said complaint failed to state a cause of action (Tr. 7), together with a memorandum of points and authorities in support of the said motion. (Tr. 8-10.) Thereafter the appellant filed a pleading which he entitled "Opposition to Motion to Dismiss" (Tr. 11), and a memorandum in support thereof. (Tr. 12-15.) The appellant likewise filed a motion for a writ of *habeas corpus ad testificandum* to compel his presence before the Court below for the purpose of personally pleading his cause (Tr. 16-17), which motion was not granted. Thereafter the Court below entered the following "Order Granting Motion to Dismiss Complaint":

> "Since plaintiff's complaint for a temporary restraining order concerns a matter that involves an exercise of discretion on the part of prison officials, said complaint fails to state a claim upon which relief can be granted. See 18 U.S.C.A. 4042; *Snow v. Roche,* 154 F. 2d 718; *Numer v. Miller,* 165 F. 2d 986; *DeCloux v. Johnston,* 70 F. Supp. 718. It is therefore
>
> "ORDERED that defendant's motion to dismiss the complaint be and the same is hereby GRANTED

and said complaint is hereby DISMISSED and the order to show cause heretofore issued DISCHARGED.

"Dated: December 27, 1948.

MICHAEL J. ROCHE
United States District Judge.

(Endorsed)
Filed: Dec. 27, 1948.
C. W. Calbreath, Clerk."[1]
(Tr. 18.)

From this order appellant now appeals to this Honorable Court. (Tr. 22.)

QUESTION.

Did the Court below have the power to order the warden of the United States Penitentiary at Alcatraz, California, to transmit the letter in question?[2]

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[1]The case of *Snow v. Roche* which has been inadvertently cited in the aforementioned order as appearing in 154 F. 2d at page 718, is actually reported in 143 F. 2d at page 718.

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[2]"Alcatraz, California
October 16, 1948

Albert A. Spiegel, Esq.,
1655 Polk Street
San Francisco, California
Dear Mr. Spiegel:

With a view to soliciting your service, I should like very much for you to make arrangement to visit me relative to pending and anticipated legal matters.

In view of the personal animus of the director of the United States Bureau of Prisons and the fact that I have an attorney of record, Mr. James J. Laughlin, National Press Building, Washington, D. C., you might find it expedient to contact Mr. Laughlin and ask him, in my behalf to authorize you to visit me.

The Federal Gestapo has effectively surpressed my efforts to communicate with counsel in the past, (see Sanders v. Johnston 159 F (2d) 74), therefore, I seriously doubt you will receive this

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

It appears from the complaint filed by the appellant that the relief which he seeks therein involves an exercise of discretion of the appellee, the warden of the United States Penitentiary at Alcatraz Island, California under rules promulgated for the governance of inmates of penal institutions, in accordance with the provisions of Title 18 U.S.C.A. Section 4042.[3] It

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letter. If you do, I should like for you to make a note of the date received.

Sincerely yours,
HILLIARD SANDERS PMB 668
United States Penitentiary
Alcatraz, California

(Endorsed) FILED: Oct. 26, 1948.
C. W. CALBREATH, Clerk."

Exhibit "A", Appellant's Complaint for Temporary Restraining Order. (Tr. 5.)

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[3] "§4042. *Duties of Bureau of Prisons.*

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States.

This section shall not apply to military or naval penal or correctional institutions or the persons confined therein."

Title 18 U.S.C.A., Section 4042.

The above quoted code section supplanted, as of September 1, 1948, Title 18 U.S.C.A., Section 753a, which read in pertinent part as follows:

"The Bureau of Prisons shall have charge of the management and regulation of all Federal penal and correctional institutions

was on this ground that the Court below dismissed appellant's complaint, and in entering this order the Court below cited as authority the following cases which appellee herein also adopts to support this proposition which he too likewise advances.

Snow v. Roche, (C.C.A. 9), 143 F. (2d) 718, certiorari denied, 323 U. S. 788;

Numer v. Miller, (C.C.A. 9), 165 F. (2d) 986;

DeCloux v. Johnston, (D.C.N.C.), 70 F. Supp. 718.

Furthermore, it is well settled that it is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.

Platek v. Aderhold, (C.C.A. 5), 73 F. (2d) 173, 175;

Kelly v. Dowd, (C.C.A. 7), 140 F. (2d) 81, 83. Certiorari denied, 320 U. S. 786.

Sarshik v. Sanford, (C.C.A. 5), 142 F. (2d) 676.

See also:

In re Terrill, 144 F. 616;

Crites v. Hill, 9 F. Supp. 975;

Hauck v. Hiatt, 50 F. Supp. 917.

Appellee now calls to the attention of this Honorable Court its decision in *Sanders v. Johnston,* 159 F. (2d) 74. In this case appellant, who is the same person as

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and be responsible for the safe-keeping, care, protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States * * *''

the appellant in our case at bar, had unsuccessfully sought in the District Court to enjoin the warden from interfering with his use of the mails to write his attorney in the District of Columbia. On appeal the warden insisted that the judgment of the Court below should be affirmed on the ground that the action of the warden constituted an exercise of administrative discretion with which the Courts had no authority to interfere. This Honorable Court, however, sustained the decision of the District Court (Judge Denman dissenting), without inquiring into what authority, if any, the lower Court had in the premises. In this connection we quote from this decision at page 75:

> "We need not inquire what if any authority the courts have in the premises. The complaint was properly dismissed for failure to state facts sufficient to entitle appellant to relief. The contents of the letters may have involved a gross breach of prison discipline—may, indeed, have been wholly unrelated to the cases in which Laughlin was acting as appellant's counsel; and in the absence of allegations showing the contrary we are obliged to assume that such was the case. Laughlin v. Cummings, 70 App. D. C. 192, 105 F. 2d 71."

The reading of the foregoing language indicates that if a letter involves a "gross breach of prison discipline," that the warden is within his rights in not mailing the same. Certainly the letter in our case at bar, which refers to federal officials as the "Federal Gestapo", does involve a "gross breach of prison discipline." Its contents are scurrilous, defamatory, and contumacious. Furthermore in this decision this Court

seemed to hold that the letter must be written to one who is actually the inmate's counsel, which is not the case here, since appellant in the letter in question states that his attorney is a Mr. James J. Laughlin of Washington, D. C. In addition, the letter in question fails to indicate the nature of the litigation which he desires to institute, which also seems to be a requirement laid down by this court in *Sanders v. Johnston,* supra. Even Judge Denman in his dissent, by suggesting that the inmate should be permitted to amend his petition so as to divulge the contents of the letter that he seeks to mail to his attorney, seemed to likewise hold that if a letter involves a "gross breach of prison discipline", that it is properly subject to restriction from the mails.

In this connection, we quote the language of this Honorable Court in *Numer v. Miller,* supra, at page 987:

> "As to the asserted violation of constitutional guaranties, we may add that a prisoner who persists in abusing a privilege or opportunity extended to all prison inmates is in no position to complain of unequal treatment if the privilege is taken away from him."

SUMMARY.

The appellant has failed to state a cause of action. The action of the court below can properly be sustained on the ground that the letter in question, being scurrilous, defamatory, and contumacious, involved a

"gross breach of prison discipline." The appellee, however, respectfully urges this court to affirm the order of the court below on the ground stated by the court below, that "since plaintiff's complaint for a temporary restraining order concerns a matter that involves an exercise of discipline on the part of prison officials, said complaint fails to state a claim upon which relief can be granted." Appellee makes this request so that this Honorable Court by its decision may in the future discourage useless and burdensome litigation.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the court below is correct and should be affirmed.

Dated, San Francisco, California,
April 18, 1949.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.